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IN THE

Supreme Court of the United States

No. 71-215

IN THE MATTER OF ANTHONY F. AVALLONE,
Attorney at Law, *Petitioner*

v.

BOARD OF BAR COMMISSIONERS,
State of New Mexico, *Respondent*

On Petition for a Writ of Certiorari to the Supreme Court of New Mexico

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Supreme Court of New Mexico is not yet reported, but appears at Appendix A1 of the Petition herein.

QUESTION PRESENTED

Respondent, Board of Bar Commissioners of the New Mexico State Bar, pursuant to Rule 24(1) of the Revised Rules of the Supreme Court of the United States, files this brief in opposition to the petition for writ of certiorari on the ground that the case does not present a substantial federal question and on the further ground that a federal question was not timely or properly raised or expressly passed on below.

STATEMENT

This is an application for a writ of certiorari to the Supreme Court of New Mexico concerning its action suspending petitioner for 120 days from the practice of law in New Mexico.

The committee on ethics, grievances and discipline of the State Bar of New Mexico filed complaints against petitioner, an attorney practicing law at Las Cruces, New Mexico. The complaints contained five counts, charging unethical conduct in the following respects:

(1) Stirring up litigation and soliciting employment, in attending a meeting of lay persons, in violation of Canons 27 and 28.

(2) Soliciting employment as a lawyer by use of his name and telephone number in the Las Cruces telephone directory in connection with businesses other than his law practice and by use of common signs in front of his law office to advertise both that and his realty business, all in violation of Canon 27.

(3) Filing a scurrilous and scandalous pleading in a suit pending in the Third Judicial District, in violation of Canons 29 and 30.

(4) Filing litigation unjustifiably, in violation of Canon 30.

(5) Threatening to file and filing a criminal action in an attempt to collect a civil debt, in violation of Canon 15.

To the complaints the petitioner filed his answers, admitting certain of the facts but generally denying that any violation of the Canons of Ethics occurred, or that there was misconduct sufficient to warrant the imposition of discipline.

After two days of hearing evidence in Las Cruces, New Mexico, and one day in Albuquerque, the commissioners who heard the matter as referees of the Supreme Court of New Mexico filed their findings of fact, conclusions of law and recommendations. A concise summary of these findings, conclusions and recommendations as to each count is as follows:

1. As to Count 1, the report found that petitioner did attend a meeting of lay persons concerned with the problems of urban renewal and advised them of their rights and volunteered advice to bring lawsuits, in such a way as to incite the group and stir up strife and litigation. He also solicited employment, directly or indirectly, by advising the group he would represent them on a contingency basis. The report concluded that this conduct was in violation of Canons 27 and 28, and recommended that petitioner be reprimanded.

Petitioner, in the Supreme Court of New Mexico, did not object to these findings, conclusions, or recommendation.

2. As to Count 2, the report found that petitioner caused his name to be listed in 3 different places in the Las Cruces telephone directory, one place being in connection with his realty company, and also had the same telephone number for his law office and for two other businesses which were, or would have been, relative to his law practice. It further found that petitioner continued his realty business, the "A Realty Company," from the same office, or set of offices, as his law practice, using a common telephone operator. He further advertised his realty company in the Las Cruces telephone directory, showing his name, and advertised by the use of a prominent sign in front of the common offices displayed with petitioner's law office sign, with substantially the same printing. The improper telephone listings had discontinued and the realty sign had been removed at the time of hearing. The commissioners found that proof of feeding petitioner's law practice by his other businesses was not established. The report concluded that petitioner's practices in these respects violated Canon 27, and that he should be reprimanded.

Petitioner did not object to these findings, conclusions, and recommendation.

3. The report found that the facts alleged in Count 3 of the complaint, had not been established by clear and convincing evidence and that Count 3 should be dismissed.

The Supreme Court of New Mexico affirmed this dismissal.

4. As to Count 4, the report found that petitioner, knowing that an agreement between his client and another to pay money had not been performed, was

in default, and had been rescinded, nevertheless acted with his client to avoid the consequences of a rescission, and thereafter sued the other party and his lawyers without justification, with the intention of harassing and injuring them. The report concluded that the conduct of petitioner was in violation of Canon 30, and recommended that petitioner be suspended from the practice of law, with leave to apply for reinstatement after a period of 120 days.

The Supreme Court of New Mexico affirmed this finding and recommendation, and the petition for writ of certiorari is from that affirmance.

5. As to Count 5, the charge of threatening to file and filing a criminal action in an attempt to collect a civil debt, the report found that this charge had not been established by clear and convincing evidence, and therefore that Count 5 should be dismissed.

The Supreme Court of New Mexico affirmed this dismissal.

ARGUMENT

I

There Is No Important Question of Federal Law

The New Mexico Supreme Court disbarred the petitioner for actions which showed a clear disregard for the canons of ethics and his oath as an attorney. These actions demonstrated petitioner's unfitness to practice law. It has long been undisputed that the courts have the responsibility for disciplining attorneys for serious breaches of their professional responsibility. *Ex Parte Wall,* 107 U.S. 265. If the misconduct is sufficiently serious in character, the attorney may be disbarred. In speaking of disbarment proce-

dures, this court said in *Randall* v. *Brigham,* 74 U.S. (7 Wall.) 523:

> "All that is requisite to their validity is that, when not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney, of the charges made, and opportunity afforded him for explanation and defense. The manner in which the proceedings shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation." *Id.* at 593.

The procedures followed in New Mexico in disciplining an attorney are set out in Sec. 21-2-1(3), *N.M.S.A., 1953 Comp.* Petitioner does not question the procedures provided by the statutes, but complains that he was denied due process of law and the equal protection of the law in that the findings of fact on Count 4 were not supported by clear and convincing evidence. These findings were affirmed by the New Mexico Supreme Court. He also seems to complain that Canon 30, for violation of which he was disciplined, denies freedom of speech to a lawyer. Appellant had notice of the hearing and participated in it. He was afforded ample opportunity to explain his actions and to support his charges, both in the hearing before the bar committee and in the hearing before the Supreme Court. In the opinion below the court said:

> "The record is voluminous, nevertheless, we have carefully considered the evidence and, when it is viewed in light of the Canon, we can reach no other logical conclusion than that the respondent caused to be filed the action against Clair and his attorneys with the intent to harrass and injure the defendant."

At the outset, it would be well to set forth Canon 30:

> "30. Justifiable and Unjustifiable Litigation.
>
> The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or injure the opposite party or to work oppression or wrong. But otherwise it is his right, and, having accepted retainer, it becomes his duty to insist upon the judgment of the court as to the legal merits of his client's claim. His appearance in court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination."

With this Canon should be compared that portion of the oath of a New Mexico attorney which reads,

> "I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust . . ."

The testimony presented to the referees during the hearings was somewhat compartmentalized, as to the various counts, but in the nature of such a hearing this could not be absolutely done. The Supreme Court of New Mexico, as indicated in the opinion quoted above, did carefully review all the testimony, and it found evidence to support the referees' findings. The Supreme Court of the United States does not ordinarily review evidence or correct errors in fact finding. *United States* v. *Johnston,* 268 U.S. 220, 227; *Graver Mfg. Co.* v. *Linde Co.,* 336 U.S. 271, 275; *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635; *Grayson* v. *Harris,* 267 U.S. 352, 358; *Portland R. Co.* v. *Railroad Commissioner,* 229 U.S. 397, 412; *Fry Roofing Co.* v. *Wood,* 344 U.S. 157, 160.

Summarizing the complicated facts upon which the disciplinary proceeding was based is somewhat presumptuous, and it is bound to be an over-simplification. However, at the risk of that, it will be said that petitioner filed a suit for abuse of process against the adverse party and his lawyers arising out of an earlier lawsuit for debt, which petitioner's client had lost and had resisted levy of execution. All the pleadings in both lawsuits, as well as testimony of the parties and all the lawyers involved, including petitioner, were before the referees in the disciplinary proceeding. The referees found, and the New Mexico Supreme Court affirmed,

> "4. That defendant thereafter, with respondent as his attorney, caused to be filed an action against plaintiff Clair and his attorneys, Garland, Martin and Martin, and that *it was filed with the intention of harassing and injuring the defendants.*" (Italics added.)

There is no important issue in this case, except as to petitioner himself, and this court does not ordinarily review cases which do not raise important legal problems. *Rice* v. *Sioux City Cemetery,* 349 U.S. 70, 74. No federal statute or its interpretation is involved, merely the application of the canons of ethics to a particular fact situation. Petitioner's basic position is that the decision of the New Mexico Court is erroneous, and this Court does not ordinarily concern itself with the correction of errors in a lower court decision.

Further, it appears from the opinion of the Supreme Court of New Mexico that its decision was entirely based upon an adequate nonfederal ground. The principle that the Supreme Court of the United States

will not review such a state court judgment is therefore applicable. *Murdock* v. *Memphis,* 20 Wall. 590, 636; *Berea College* v. *Kentucky,* 211 U.S. 45, 53; *Fox Film Corp.* v. *Muller,* 296 U.S. 207; *Herb* v. *Pitcairn,* 324 U.S. 117, 125-6.

Counsel for respondent would be the last person, perhaps, to argue that when suit is brought against a brother lawyer one risks prosecution for unethical conduct. On the other hand, he would be the first to assert that such a suit should only be brought after diligent investigation into the facts and the legal basis for the claim. Claims against lawyers, alleging improper conduct, should not be lightly made. And what investigation, as to the law and the fact, do we find that petitioner made? He had not represented his client during any earlier "harassment" by the other lawyer, and did not contact that lawyer before bringing the suit. He merely took his client's word for the facts. As to the law on abuse of process (the basis of the suit), petitioner appears to have read selectively from an article in an encyclopedia on the subject. He seems to have ignored the statements therein that the process must have been used, a fact which did not happen in this case, or that if the process was null and void, as petitioner himself contended it was, there could not be a suit based upon abuse of process. His legal discussion at the grievance hearing was not that of a lawyer who had briefed his case adequately. His brief to the court in the civil suit didn't even discuss the subject, in marked contrast to the detailed brief of the defendants in that case. It seems plain that petitioner could not maintain the lawsuit on the facts, as a matter of law. That he lost this cause of action in the trial court on summary judgment only confirms this conclusion.

II

No Federal Question Was Properly Raised Below

The jurisdictional statement does not disclose any stage of the proceedings before the Bar Commission or the Supreme Court of New Mexico at which, or the manner in which, any federal question of any character was raised, except a question of freedom of speech. Neither does it purport to discuss the manner in which they were passed upon by the court. The required pertinent quotations of specific portions of the record dealing with federal questions below are wholly absent and there is no support for the assertion that the rulings of the court were of such a nature as to bring this case within the well recognized requirements for jurisdiction on application for writ of certiorari. Rule 23-1(f); *Oxley Stave Co.* v. *Butler County,* 166 U.S. 648, 655; *Ellis* v. *Dixon,* 349 U.S. 458, 460-2.

The failure of appellant to meet in any respect the requirements of Rule 23-1(f) in the jurisdictional statement, makes it difficult to determine whether, in fact, any federal constitutional question was ever raised by appellant in the court below, except that it appears the freedom of speech contention was raised in the *brief in support of the motion for rehearing.* That motion for rehearing, a copy of which is attached hereto as Appendix A, certainly does not mention any constitutional issue. Insofar as disclosed by the opinion of the Supreme Court of New Mexico, it is apparent that no constitutional question was considered by that court. There is no reference in the opinion to such an assertion by appellant and there is no ruling upon any federal question of any character. *Minnesota* v. *National Tea Co.,* 309 U.S. 551, 554;

Perkins v. *Benguet Mining Co.*, 342 U.S. 437, 441-3. This is also true of the findings and conclusions of the Board of Bar Commissioners.

Page 2 of the writ of certiorari purports to claim that petitioner was deprived of due process of law and equal protection of the law on the basis there was no specific finding of fact that appellant was convinced the litigation he instituted was intended merely to harass and injure, but nowhere does he point out his contention before the Board of Bar Commissioners or before the Supreme Court of New Mexico that he was thus denied due process and equal protection. Even in the motion for re-hearing, no such contentions appear.

In *Live Oak Water Users' Ass'n* v. *R. R. Comm'n*, 269 U.S. 354, this Court said:

> "The brief further states that by the application to the railroad commission for rehearing and in the petition to the supreme court of California for review, plaintiffs in error set up their federal claims. No citations to the record accompany this statement, as our rules require. Rule 25, 2(c). A claim merely presented to the commission upon application for rehearing would not suffice to give us jurisdiction. It must have been definitely brought to the court's attention. Although a copy of the request for rehearing addressed to the commission is annexed to the petition to the Supreme Court, this petition made no claim under the federal Constitution with sufficient definiteness for us to say that the court's attention was challenged thereto. Neither opinion of the court shows that it considered or necessarily passed upon any such question. After the second opinion, a petition for rehearing dwelt much on federal rights, but this was denied without more and is now without consequence."

It is apparent that any constitutional issue on which appellant now seeks to rely was neither brought to the attention of the referees, Board of Bar Commissioners, nor the Supreme Court of New Mexico in the manner required to permit review by this court. It is equally apparent that appellant has wholly failed to meet the requirements of the Rules of this court which are a prerequisite for the review here sought by petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition should be denied.

J. R. Modrall

Robert S. Skinner

September 10, 1971